

Internal Revenue Service
Appeals Office
1000 S. Pine Island Rd., Room 350
Plantation, FL 33324

Release Number: 201119039

Release Date: 5/13/2011

Date: September 9, 2010

A

B

Department of the Treasury

A = Org. Name

B = Org. Address

C = EIN

Name of Plan/Plan Number:

A

Taxpayer Identification Number:

C

Form Number:

Plan Year(s) Ended:

Person to Contact/ID Number:

Telephone Number:

CERTIFIED MAIL

UIL Code: 7474.00-00

Dear

This is a final revocation letter. The above named plan does not meet the requirements of section 401(a) of the Internal Revenue Code effective for plan year ending September 30, 19 and subsequent plan years. The trust is not exempt under section 501(a) of the Code for the trust year ending with or within the affected plan year. In addition, our favorable determination letter to you dated January 6, 1997 is revoked. The explanation of our revocation is attached.

You may petition the United States Tax Court for a declaratory judgment as to the qualification of this plan. If you do so, the petition must be filed before 92 days after the date this letter was mailed to you. The enclosed Publication 1020, *Appeal Procedures Employee Plans Examination*, provides specific instructions under the heading "Tax Court Declaratory Judgment Cases." The time you have to file a petition with the Tax Court is fixed by Law, and cannot be extended or suspended. Thus, contacting the Internal Revenue Service (IRS) for more information, or receiving other correspondence from the IRS will not change the allowable period for filing a petition with the Tax Court.

If you have any questions, please contact the person whose name and telephone number are shown above. If you write, please include your telephone number, the best time for us to call if we need more information, and a copy of this letter to help us identify your account.

Sincerely,

IRS Commissioner
By

Charles Fisher
Team Manager

Enclosure:
Publication 1
Publication 1020
Explanation of Revocation
Return Envelope

Internal Revenue Service

Department of the Treasury

Name of Plan/Plan Number:

Taxpayer Identification Number:

Form Number:

5500

Plan Year(s) Ended:

Person to Contact/ID Number:

Telephone Number:

Date: February 7, 2008

CERTIFIED MAIL

Dear

We propose to disqualify the above-named plan because our examination found that the plan does not meet the requirements of section 401(a) of the Internal Revenue Code. Enclosed is an explanation of this disqualification, which is effective for plan year(s) ending September 30, 19 and subsequent plan years. We also propose to revoke our favorable determination letter to you dated October 1, 1997. Therefore, the trust will no longer be exempt from tax under section 501(a) of the Code for the trust year(s) ending with or within the affected plan year(s).

If you do not agree with this revocation, you may appeal within 30 days from the date of this letter. To file your appeal, please follow the instructions in the enclosed Publication 1020, *Appeal Procedures Employee Plans Examinations*, under the heading "If You Don't Agree." If you do not appeal, your ability to obtain a declaratory judgment in the Tax Court as to the qualification of this plan may be impaired. Internal Revenue Code section 7476(b)(3) provides, in part, that "The Tax Court shall not issue a declaratory judgment or decree under this section in any proceeding unless it determines that the petitioner has exhausted administrative remedies available to him within the Internal Revenue Service." We believe that an appeal is necessary to exhaust the administrative remedies available within the Internal Revenue Service. If you do not file an appeal within 30 days from the date of this letter, we will issue a final revocation letter.

You have the right to contact the office of the Taxpayer Advocate. Taxpayer Advocate assistance is not a substitute for established IRS procedures, such as the formal appeals process. The Taxpayer Advocate can not reverse a legally correct tax determination, nor extend the time, as fixed by law, that you have to file a petition in the U.S. Tax Court. The Taxpayer Advocate can, however, see that a tax matter not resolved through normal channels, gets prompt and proper handling. You may call toll-free 1-877-777-4778 to request Taxpayer Advocate assistance.

We have also enclosed Publication 1 and Publication 594. Publication 1 includes information on your rights as a taxpayer, and Publication 594 includes information on the IRS collection process.

If you have any questions concerning this matter, please call the contact person at the telephone number shown in the heading of this letter. If you write, please include your telephone number and the best time for us to call if we need to contact you.

Thank you for your cooperation.

Sincerely,

Director, EP Examinations

Enclosure(s):

Publication 1

Publication 594

Publication 1020

Revenue Agent Report (Form 886-A – Explanation of Items)

Return Envelope

A = Corporation Name, B = Excluded Participant, XX = Year

I: Determinations:

1. There have been failures to amend the plan timely to meet certain I.R.C. § 401(a) form requirements.
2. There has been a failure to use an independent appraiser to perform annual valuations of the employer securities held by the trust as required by I.R.C. § 401(a)(28)(C).
3. Fourteen employees were excluded improperly from participation in the plan during the plan year ending September 30, 20XX.

II: Facts and Analysis:

Issue One:

The A Employee Stock Ownership Plan ("Plan") was adopted with an initial effective date of October 1, 19XX. Article 24 of the Plan defines the term, "Plan Year," as a year ending on September 30. According to Internal Revenue Service records, a favorable determination letter was issued on the qualifications of the Plan, dated January 6, 19XX, with a caveat stating the plan met the requirements of TRA '86, UCA '92, and OBRA '93. The plan sponsor amended and restated the Plan on December 18, 20XX for the purported purpose of achieving compliance with the changes in the law collectively known as GUST. The plan sponsor, however, never submitted the amended and restated Plan to the Internal Revenue Service for a favorable determination letter.

The Plan, as amended and restated on December 18, 20XX, contains the following disqualifying provisions:

- The definition of "leased employee" in Article 24, which includes the primary direction or control test of I.R.C. § 414(n)(2)(C), was not made effective under the Plan until October 1, 20XX. I.R.C. § 414(n)(2)(C), as amended by the Small Business Job Protection Act of 1996 ("SBJPA") is required to be effective for years beginning after December 31, 1996.
- The definition of "highly compensated employee" in Articles 4 and 24, effective October 1, 20XX, does not meet the requirements of I.R.C. § 414(q), as amended by SBJPA effective for years beginning after December 31, 1996.
- The provision in Article 4 that contributions, benefits and service credit with respect to qualified military service will be provided in accordance with I.R.C. § 414(u) was not made effective under the Plan until October 1, 20XX. I.R.C. § 414(u), as added by SBJPA, requires the provision to be effective on and after December 12, 1994.

- The definition of "compensation" in Article 24 (effective October 1, 20XX) used for purposes of applying the limitations on contributions and other additions to a participant's account under the Plan does not meet the requirements of I.R.C. § 415(c)(3), as amended by SBJPA, effective for limitation years beginning after December 31, 1997.
- The provisions in Articles 4 and 24 excluding hardship withdrawals of amounts attributable to elective contributions from the Plan's definition of "eligible rollover distribution" were not made effective until October 1, 20XX. I.R.C. § 402(c)(4)(C), as added by Restructuring and Reform Act of 1998, applies to distributions made after December 31, 1998.

I.R.C. § 401(b) provides for a remedial amendment period in which necessary plan amendments may be adopted after the year such amendments are required by law, provided the amendments are made retroactively effective to the first day the applicable law requires the provision to be effective. Revenue Procedure 2000-27, as modified by Revenue Procedure 2001-55, extended the deadline for an individually designed plan to be amended to comply with GUST until February 28, 20

Based on the information above, the GUST remedial amendment period for individually designed plans ended on February 28, 20. At the present time, the Plan has not been amended to comply with all of the GUST requirements. Since the required amendments were not made by the expiration of the GUST remedial amendment period, the form of the plan failed to meet the qualification requirements of Code section 401(a), effective for the plan year ending September 30, 19XX and each subsequent plan year thereafter.

Issue Two:

An employee stock ownership plan must use an independent appraiser to make annual valuations of employer securities which are not readily tradable on an established securities market. I.R.C. § 401(a)(28)(C).

It has been determined that the Plan does not satisfy the requirements relating to employee stock ownership plans stated in IRC § 401(a)(28)(C) and is not a qualified plan under IRC § 401(a), effective for the plan year ending September 30, 20XX, September 30, 20XX, September 30, 20XX and all subsequent plan years. The reason for this determination is that:

- The Plan did not use an independent appraiser to make annual valuations of the employer securities held by the trust for the plan years ending September 30, 20XX, September 30, 20XX and September 30, 20XX.
- The appraisals were not signed by the appraiser. The Internal Revenue Service requested on multiple occasions, via information document

requests, that the taxpayer provide signed copies of the appraisals. The taxpayer never provided the requested documents.

- The appraisal for the plan year ending September 30, 20XX was deficient and did not meet the requirements for a qualified appraisal.

Issue Three:

A trust for qualified plan purposes constitutes a qualified trust if the plan of which such trust is a part satisfies minimum participation requirements. I.R.C. § 401(a)(3). I.R.C. § 410(a)(1)(A) provides that a trust shall not constitute a qualified trust under I.R.C. § 401(a) if the plan of which it is a part requires, as a condition of participation in the plan, that an employee complete a period of service with the employer or employers maintaining the plan extending beyond the later of the following dates —

- (i) the date on which the employee attains the age of 21; or
- (ii) the date on which he completes 1 year of service.

A plan shall be treated as not meeting the minimum age and service conditions of I.R.C. § 410(a)(1) unless it provides that any employee who has satisfied the minimum age and service requirements of I.R.C. § 410(a)(1), and who is otherwise entitled to participate in the plan, commences participation in the plan no later than the earlier of —

- (i) the first day of the first plan year beginning after the date on which such employee satisfied such requirements, or
- (ii) the date 6 months after the date on which he satisfied such requirements,

unless such employee was separated from the service before the date referred to in subparagraph (i) or (ii) above, whichever is applicable.

Section 5 of the Plan provides in pertinent part:

As of each Accounting Date during your participation, you share in the Employer Contributions, Forfeitures and Income of the Trust for the year. The total Employer Contributions and Forfeitures will be allocated among Participants' Accounts in proportion to their Compensation. The net income of the Trust will be allocated to Participants prorated according to your individual Account Balances as of the preceding Accounting Date.

Certain employee census information applicable to individuals employed during the plan year ending September 30, 20XX, was obtained during the examination, including dates of birth, dates of hire, and dates of termination, along with the applicable W-2 wage information. Although requested in a letter dated June 30, 20XX, information needed to

determine hours worked by certain employees during the September 30, 20XX plan year were not furnished to the Internal Revenue Service. The Internal Revenue Service calculated the hours worked by each employee excluded from the Plan by dividing his or her W-2 compensation by the Federal minimum wage in effect for the applicable plan year.

Based on its calculations, the Internal Revenue Service determined that the following fourteen employees met the Plan's minimum participation requirements for the plan year ending September 30, 20XX, but were excluded from participation:

- (i) B
- (ii) B
- (iii) B
- (iv) B
- (v) B
- (vi) B
- (vii) B
- (viii) B
- (ix) B
- (x) B
- (xi) B
- (xii) B
- (xiii) B
- (xiv) B

As a result, the Plan failed to meet the minimum participation requirements required under I.R.C. § 401(a)(3) for plan years ending September 30, 20XX and all subsequent plan years.

III: Conclusion:

It is determined that the Plan is not qualified under I.R.C. § 401(a) for the plan years ending September 30, 19XX and all subsequent plan years. As a result, the Plan trust is not exempt from taxation under I.R.C. § 501(a) for trust years ending with or within the affected plan year and all subsequent trust years.